IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.703 OF 2002

1. Balasaheb Shivgonda Khot Age 30 yrs. Occ : Waiver, 2. Basawraj Kallaya Swami, Age 38 yrs. Occ. Service 3. Suresh Shivgonda Khot, Age 40 yrs. Occ. Jober Work 4. Bharat Bapu Khot Age 26 yrs. Occ. Waiver	]]]]]]]]]]	Appellants. (Original Accused Nos.1 to 4.)

versus

The State of Maharashtra, (At the instance of Sr.P.I. Ichalkaranji Police Station, Dist. Kolhapur.	]]]]	Respondent.

Mr.P.R.Arjunwadkar i/by Ganesh Gole for the appellants/accused.

Smt.M.M.Deshmukh, APP, for the State.

ALONG WITH

CRIMINAL APPEAL NO.1270 OF 2002

The State of Maharashtra, (At the instance of Ichalkaranji Police Station, Shivaji Nagar, Tal.Hatkangale Dist. Kolhapur.	]]]]]	Appellant (Original Complainant)
versus		
1. Balasaheb Shivgoonda Khot Age 30 yrs. Occ : Waiver,	]]	
2. Basavraj Kallaya Swami, Age 38 yrs. Occ. Service	]]	
3. Suresh Shivgonda Khot, Age 40 yrs. Occ. Jober Work	]]	Respondents.
4. Bharat Bapu Khot Age 26 yrs. Occ. Waiver	]]	(Original Accused Nos.1 to 4.)

Mrs.M.M.Deshmukh, APP, for the State/Appellant

Mr.P.R.Arjunwadkar i/by Ganesh Gole for the Respondents/Accused

CORAM : D.G.DESHPANDE

SMT.R.S.DALVI, JJ.

DATED : December 20, 2006.

JUDGMENT [PER D.G.DESHPANDE,J]

1. All the four accused, who have been convicted by the 2nd Ad-hoc Additional Sessions Judge, Kolhapur under section 304 Part II of the Indian Penal Code and sentenced to suffer R.I. for three years and to pay fine and in default sentence, have challenged their conviction by Criminal Appeal No.703 of 2002. The State of Maharashtra has filed other appeal vide Criminal Appeal No. 1270 of 2002 for enhancement of sentence. We heard both the appeals jointly.

2. Original charge against all the accused was under Section 302 of the Indian Penal Code for committing murder of one Appaso Atmaram Jambhale. The background in which the accused came to be tried is as under :-

3. The accused and the deceased were the residents of Jangamwadi, Tal. Hatkangale, Dist. Kolhapur. There used to be a fair of Goddess Mahalaxmi every year in the month of May. This fair was an occasion to celebrate for the villagers in different manner. They used to hold different competitions like bullock-carts race, horse-carts race and cycling etc. They used to form a committee to see that different competitions are to be held properly and the function should go smoothly. In the year 2001, the fair commenced from 17th May 2001. Different competitions were held during the day. In the night there was to be prize distribution ceremony followed by a program of hypnotism.

4. A stage was erected in front of the temple. Many persons were on the stage for the evening program. As the program of prize distribution ceremony and lectures was consuming more and more time, therefore, the spectators, who were about 200 to 300 in crowd, became restless. They started making hue and cry to stop the function so that the program of hypnotism should commence.

5. In this agitated state of mind it is alleged that the deceased, who was making announcement on mike, was pulled down and assaulted by all the accused. The manner of assault was that accused No.1 caught hold of the collar of the shirt of deceased. Accused No.2 pulled him down, consequently, the deceased fell down from the stage. Accused No.2 gave kick on the private part of the deceased. Accused Nos. 3 and 4 bet the deceased by kicks and fists.

6. The deceased became unconscious, therefore, the persons, who were present there, ran to his rescue. He was offered water to drink, however, he did not drink the water. Therefore, one Mahesh Khot and his friend carried the victim Appaso to Hupari Government Hospital on motor cycle of Mahesh Khot. At about 1.45 a.m. one Nandkumar went to the police station and lodged F.I.R. (Exhibit 16). The offence was registered. API Landage made investigation, prepared spot panchanama, recorded statements of witnesses, arrested the accused and filed the charge sheet.

7. The defence of the accused was of total

denial and false implication. But the trial Court found that the accused were guilty, not for the offence under Section 302, but under Section 304 Part II of the Indian Penal Code and, therefore, they were sentenced to imprisonment as stated above. Hence this appeal being Criminal Appeal No.703 of 2002 filed by the accused. The State is not satisfied with the sentence awarded to the accused and, therefore, the State filed its appeal being Criminal Appeal No.1270 of 2002 for enhancement of sentence.

8. The counsel for the accused Mr.Arjunwadkar contended that this is not at all a case either of murder or of Section 304 of the Indian Penal Code. But it is unfortunate death of Appaso due to accident. He contended that the trial Court has totally lost sight of the background in which the incident occurred and wrongly convicted the accused. Therefore, he prayed that this was a clear cut case for acquittal of the accused.

9. On the other hand the learned APP contended that firstly the conviction of the accused under Section 304 Part II of the Indian

Penal Code is wrong and they should have been convicted under Section 302 of the Indian Penal Code and in any case alternatively the sentence of three years awarded to all the accused is inadequate. She also contended that the accused were not entitled for acquittal.

10. Following are the admitted facts in this case. These facts have come on record from the evidence of eye witnesses and Investigation Officer also.

Goddess Mahalaxmi is worshiped by the villagers of Jangamwadi.

Every year there used to a fair of the said Goddess.

Several entertainment programs are held or arranged during this fair.

A committee is formed to look after different functions.

In 2001, the fair started on 17th May 2001. One Raju Shankar Khot was the

President of the said committee with other members including Sharad Salunkhe, Rajendra Parkale, Dattatraya Parkale, Yashwant Jambhale, Sanjay Khot, Shivaji Chopade, Rajaram Pawar, Raju Chopade. There were many other volunteers. One of them being deceased Appaso.

11. As per the admitted facts, the fair was started on 17th May 2001. Bullock carts race and bicycles race were held with other competitions. It was 19th May 2001 when the prize distribution ceremony was arranged, to be followed by the program of hypnotism. Platform was created in front of the temple of Goddess Mahalaxmi. Program of Hypnotism was to start at 9 ‘O’ Clock. However, as the program of prize distribution ceremony took so much time, the spectators, who were about 200 to 300 in crowd, became impatient. Those people started making hue and cry that the main function should be started. Attempts were being made to pacify the mob. Different assurances for concluding prize distribution at the earliest were being given. It is also admitted fact on record that the police officers were present for maintaining law and order

situation.

12. Further admitted fact is that there is absolutely no enmity of any of the accused with deceased Appaso. It is also admitted fact that deceased Appaso was one of the persons trying to pacify the mob. One of the important witness viz. Nandkumar Jambhale, who is the nephew of deceased Appaso, admitted that the accused were on visiting terms to deceased Appaso prior to the incident. They used to go each other's houses for attending functions and accused No.2 used to help deceased Appaso in his needs.

13. The cause of death of deceased Appaso as per the medical expert (PW 8) - Dr.Padmakar Naik is "shock due to internal heamarrhage in the brain due to fracture of skull." This doctor in column 18 specified the injuries as "Compressed fracture on vertex 1" x 1" bone deep and transverse in nature". These were anti mortem injuries. There is no serious challenge to the cause of death. No other hypotheses were suggested to the doctor.

14. In the background of these facts, it is

to be found whether all the accused or any of the accused can be held guilty under Section 304 Part II of the Indian Penal Code, as has been done by the trial Court. The prosecution has examined seven witnesses, who are the eye witnesses. They are P.W.No.1 - Nandkumar Jamble; P.W.2 - Sambhaji More; P.W.3-Dadasaheb Khot; P.W.4-Raju Khot; P.W.5-Suresh Salunkhe; P.W.6-Shrikant Kore; and P.W.7- Dattatraya Parkale. All the eye witnesses have given almost similar version of the actual incident. Some of those narrations are as under :-

P.W.1 - Nandkumar Ananda Jamble

. "Accused Balasaheb Khot caught the collar of the shirt of the deceased and dragged him on the ground from the stage. He fell down on the stage on his head. Thereafter, accused Basavraj Swami held one leg of the deceased and dragged him on the ground from the stage. Thereafter accused Suresh Khot and Bharat Khot started giving him kick blows on his private part."

P.W.2 - Sambhaji Balwant More

. Accused Balu khot caught hold the collar of shirt of Aappasaheb Jamble (deceased) and fell him down on the stage. Thereafter accused Basavraj Swami caught his one leg and dragged him from the stage on the ground. Aappasaheb fell down on the ground from the stage with force and thereafter all the accused persons gave him fist and kick blows."

P.W.3 - Dadasaheb Rajaram Khot

. This witness was hostile. Hence he does not support the prosecution.

P.W.4 - Raju Shankar Khot

. Same as stated by the P.W.Nos.1 and 2.

P.W.5 - Suresh Mahadev Salunkhe

. Same as stated by the P.W.Nos.1 and 2.

P.W.6 - Shrikant Vilas Kore

. This witness had seen only the accused

Balu Khot caught hold the collar of Appasaheb and fell him on the stage and other three accused were present till Appasaheb that they should start function immediately. This witness learnt about the manner of assault through others. Therefore evidence of this witness is the hearsay evidence.

P.W.7 - Dattatraya Lakshman Parkale

. Same as stated by the P.W.Nos.1 and 2.

15. From the aforesaid evidence of all these eye witnesses, it will be clear that deceased Appasaheb fell down on the stage firstly and then secondly he was pulled and dragged from the stage and then he fell down on the ground. There is absolutely no allegation against any of the accused that they used any weapon or object for assaulting Appasaheb on his head. The injury was caused as a result of falling on ground. The crucial question lost sight of the trial Court is, when injury was on vertex, it can be caused by falling Appasaheb on stage or pulling him from stage on the ground. Vertex is admittedly top most part of the head. Generally, if a man is

pulled down, he would receive injury on the back of the head or on the forehead. Not a single witness, out of the seven eye witnesses, has explained how Appasaheb fell on the vertex. Further after Appasaheb fell down on the stage, he was dragged from the stage. Dragging had to be minimum to the extent of his height, so it would be more than five feet in any case. There was not a single scratch on the body of Appasaheb or abrasion because of rubbing or dragging of front portion i.e. chest, stomach, thighs etc.

16. Therefore, the medical evidence and the account given by the eye witnesses is not hand in hand in this case. In the evidence of doctor, who conducted post mortem, apart from the injury on vertex, deceased Appasaheb had abrasion on fingers of both the legs and both thighs were bluish in colour. So far as these injuries are concerned, the doctor admitted that these injuries are possible if a person slips. In the cross examination, the doctor also admitted that abrasion on both legs are possible if a person sitting on the motor cycle come in contact with earth, which means that by dragging of legs on

the ground and, appearing bluish colour on the thighs, according to the doctor, is possible due to beating.

17. But apart from this injury, the doctor did not note any other injury on the chest or back in the form of abrasions, scratches. Admittedly, after Appasaheb fell down, he was taken on motorcycle fitted in between two persons i.e. the rider and pillion rider. He was declared dead before he reached the hospital. And, therefore, if a dead man is taken to hospital in such a manner, his legs are likely to get rubbing against the ground resulting to abrasion on legs. There are no injuries noted by the doctor on the private part of the deceased even though every witness testified about the same.

18. The trial Court has held the accused guilty under Section 304 part II of the Indian Penal Code i.e culpable homicide with the knowledge that the injuries are likely to result in death. We do not find any justification for upholding that finding and conviction because of the background in which the death of Appasaheb

occurred. This background is, as admitted and stated by all the witnesses, as under :-

. That the villagers of Jangamwadi were used to celebrate Goddess Mahalaxmi fair every year. In 2001 the fair started on 17th May. Different competitions i.e. races of bullock carts, horse-carts and bicycles were held on 17th and 18th May 2001. On 19th May 2001 there was prize distribution ceremony to be followed by the program of hypnotism. More than 200 to 300 people had gathered in that night for watching both these programs. They were mainly interested in the program of hypnotism. But the program of prize distribution and lectures was taking more and more time, the crowd became restless and started shouting and raising hue and cry. They were repeatedly pacified by different persons including Appasaheb and at that time, the incident is alleged to have happened. Therefore, there cannot be of any intention on the part of the accused to commit any offence nor they can be attributed to any knowledge. It appears that the attempt of pacifying was making more and more irritation to the huge crowd and, therefore, in that background this incident had occurred.

Neither the intention nor any knowledge under section 34 can be attributed. When the accused Balasaheb Khot allegedly caught hold of the collar of the shirt of Appasaheb and pulled him, Appasaheb fell down on the stage. This is the only act attributed to the accused Balasaheb Khot. There is no evidence that this act of accused Balasaheb Khot resulted in head injury. This accused Balasaheb pulled Appasaheb from the stage on the ground and then Appasaheb was given fist and kick blows by all the accused. Admittedly, accused Nos. 3 and 4 have no part to play in pulling Appasaheb in both the occasions. The role attributed to them is giving fist and kick blows only. However, the trial Court found them guilty under Section 304 i.e. common intention.

19. From the circumstances it has to be held that common intention of the accused was only to give vent to their feelings or feelings of mob or the feelings of unrest people. The mob was tired of the prize distribution ceremony and it was eager and anxious to see the program of hypnotism. Since Appasaheb was one of the persons who tried to pacify them again and again

in order to see that the prize distribution ceremony should continue for some more time, the mob, including these accused, became furious and pounced upon Appasaheb to silence him not for every but for temporary. One of the most important aspect of the matter is that the evidence of P.W.9 API Landage - it was he who took the FIR at 1.45 a.m. on 20/5/2000 i.e. during the night intervening 19th and 20th May 2000. He has stated that before registering the FIR, he had gone to village Jangamwadi which was at 13 kilometres. ASI Kore was present in the function. ASI Kore also did not produce his weekly diary. Before registering the FIR, the IO made inquiry with the family members of Appasaheb, but nobody complained him about the incident. P.W.9 also made inquiry from the president and other members of the fair committee. He was told about the incident but nobody made complaint to him nor anybody lodged report about the death of Appasaheb. Similarly, ASI Kore and other police constable Jadhav, who were present for Bandobast during that function, did not lodge any complaint to him or report to him.

. P.W.9 also admitted in the cross examination that during investigation it was not revealed to him that all the accused persons were sitting in front of the stage before commencing the program on that night.

20. The learned advocate for the accused therefore contended that, if, as admitted by P.W.1 Nandkumar, the accused had good, cordial and visiting terms with Appasaheb and if accused No.2 was helping Appasaheb in the time of his needs and if in spite of presence of ASI Kore, Constable Jadhav and subsequent visit of PW.9 Landage, none from the family members of Appasaheb or from the managing committee lodged complaint about this incident, then this could not be a case attributing any of the provision of Indian Penal Code. At any rate, he contended that, the accused could not be convicted under Section 304 Part II of the Indian Penal Code.

21. The fact that the FIR was lodged at 1.45 a.m. on 20/5/2000 and the fact that before recording the FIR, API Landage had gone to village Jangamwadi and made inquiry from the villagers about the incident, support the

argument of the advocate for the accused that the FIR cannot be treated as such at all.

22. The learned APP tried to contend that if the relations of the accused with deceased Appasaheb were cordial, then there was no reason to falsely implicate the accused.

23. In our opinion, this question can come at a stage when We are inclined to believe the prosecution story as it is. The charge against the accused was 302 originally and later on they were convicted under Section 304 part II of the Indian Penal Code. But We are not inclined to believe the prosecution story for all the reasons stated above and, therefore the question as to why the accused should be falsely implicated becomes irrelevant.

24. In the background of the incident, repeatedly narrated by us as above, the learned advocate for the accused rightly contended that this incident occurred on the spur of moment and looking to the mob psychology, it could be as a result of mob fury. This has to be accepted in the background of this particular case.

25. However, the fact that the seven eye witnesses are deposing against the accused cannot be disregarded. Considering everything in favour of the accused, We find that this is a case falling under Section 304-A of the Indian Penal Code i.e. Causing death by rash or negligence act. Section 304-A reads thus :-

> "Causing death by negligence - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Punishment prescribed is fine or imprisonment or both. Advocate for the accused has contended that none of the accused had any criminal antecedents. They are simple villagers. Accused Nos.1 and 4 are weavers. Accused No.3 was doing some job work and accused No.2 is highly educated person and holds M.Sc. M.Phil B.Ed. degree and was the head of Department of Geography. In these circumstances, We propose to take recourse

of Section 360 of the Criminal Procedure Code.

26. For all these reasons, the appeal of the accused is required to be allowed. So far as State appeal is concerned, it is required to be dismissed. Hence We pass the following order :-

:ORDER:

The Appeal of the Accused being Criminal Appeal No.703 of 2002 is partly allowed.

Conviction of all the accused under Section 304 Part II of the Indian Penal Code is set aside. Accused Nos.1 and 2 are convicted under Section 304-A of the Indian Penal Code and sentenced to suffer R.I. for three months and Accused Nos.3 and 4 are convicted under Section 323 of the Indian Penal Code and sentenced to suffer R.I. for three months. However, We direct to release all the accused forthwith on probation of good conduct for a period of six months under Section 360 of the Criminal Procedure Code on a

condition that, within a period of two weeks from today, they shall enter into a bond of Rs.3000/- each with one surety in the like amount to appear and receive sentence when called upon during six months if they do not keep peace and are not of good behaviour.

Each of the accused to execute a bond before the trial Court.

The appeal of the State being Criminal Appeal No.1270 of 2002 is dismissed.

Both the appeals are disposed of accordingly.

[D.G.DESHPANDE,J]

[SMT.R.S.DALVI, J]